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Contracts-Statute of Frauds-Guaranty

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CONTRACTS—STATUTE OF FRAUDS—GUARANTY—The Bank of Linn Grove claimed as a set-off, in an action against the receiver of the Wells County Bank, an amount claimed to be due on a contract between the Wells County Bank and Thomas J. McKean, the Bank of Linn Grove being the assignee of McKean's rights under the contract. McKean purchased from the Wells County Bank certain notes and mortgages which were executed to it and received receipts, the bank retaining possession of the notes and mortgages and agreeing to collect the interest and look after the mortgages. The bank was to retain 1% of the interest provided for, so that if the instrument drew 6% interest, McKean was to receive only 5%. The purchaser did not investigate the titles nor the value of the security. He was assured that they were good and that the bank was "back of them," and it was agreed that he be paid the face of the mortgage and accrued interest at any time on surrender of the receipt. The purchaser understood that the bank was guaranteeing the notes and the bank agreed to repurchase them from him at any time he desired them to do so. *Held*, the promise of the bank was a promise to answer for the debts and defaults of others within Burns (1926) Sec. 8045. *Bank of Linn Grove v. Stults*, Appellate Court of Indiana, June 18, 1931. 176 N. E. 707.

While writers are agreed that no promise which differs in scope from that of another obligor is within the statute, they are not agreed as to whether a new promise to pay irrespective of the liability of any original debtor is within the statute, and there is little authority on the point. *Williston on Contracts*, Sec. 455 *et seq.* If in this case the court has correctly stated the facts in saying that "it was agreed that he be paid the fact of the mortgage and accrued interest at any time on surrender of the receipt" and "the bank agreed to repurchase the notes from him at any time he desired them to do so," then it would seem that Indiana has adopted the rule that a promise to pay at all events is not a promise different in scope from the original obligation, and therefore falls within the statute.

Many eminent writers and jurists believe that the statute of frauds occasions injustice in as many cases as those in which it tends to prevent frauds, and the tendency of courts in most jurisdictions in modern times is to take cases out of the statute wherever there is a well established judicial exception recognized concerning the application of the statute. See *The Statute of Frauds—A Legal Anachronism*, by Hugh E. Willis, in 3 Ind. L. Journal 427 and 528.

In *Fitzgerald v. Morrissey*, 14 Neb. 198, 15 N. W. 233, the court said, "Where the leading purpose of a person who agrees to pay the debt of another is to gain some advantage or promote some interest or purpose of his own, and not to become a mere guarantor or surety of another's debt, and the promise is made on a sufficient consideration, it will be valid although not in writing." In *Wilson v. Hentges*, 29 Minn. 102, 12 N. W. 151, the court narrowed the rule to the following form: Where the holder of a third person's contract transfers the same to another person, upon consideration moving to himself, his guaranty thereof, made simultaneously with the transfer, and as a part of the transaction, is not a special promise to answer for the debt or default of another, within the meaning of the statute of frauds, and therefore need not be in writing. Substantially the same general rule is laid down in 29 *Am. & Eng. Enc. Law*, 2d Ed., p. 929; *Hargreaves v. Parsons*, 13 M. & W. 561; *Ashford v. Robinson*, 8 Ired. Law 114; *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360; *Cardell v. McNeil*, 21 N. Y. 336; *Malone v. Keener*, 44 Penn. St. 107; *Thomas v. Dodge*, 8 Mich. 50; and *Eagle Mowing and Reaping Machine Co. v. Shattuck*, 53 Wis. 455, 10 N. W. 690, 40 Am. Rep. 780. In *Hackleman v. Miller*, 4 Blackf. 322, it was held that if a third person be induced to buy the note of a deceased person by the promise of the administrator that it should be paid, the promise is not within the statute of frauds. In *Beatty v. Grim*, 18 Ind. 131, a verbal contemporaneous agreement, made by the sellers of a contract for the delivery of hogs, in reference to the performance by them of its stipulations, in the event of the failure of the original contracting parties, was held to be enforceable without violation of the statute of frauds.

A mere agreement of a third person to pay the mortgage debt of another is within the statute of frauds; but where the grantee agrees, as a part of the purchase price, to pay a mortgage indebtedness, such agreement is not within the statute. *Southern Indiana Loan & Savings Institution v. Roberts*, 42 Ind. App. 653, 86 N. E. 490. However, the court said in *Berkshire v. Young*, 45 Ind. 461, that where there is an unwritten promise to pay the debt of another for a valuable consideration, to hold such a promise binding would practically nullify the statute. Its purpose would be utterly defeated and the binding force of contracts would depend upon the question whether they were founded upon a valuable consideration, and not whether they were in writing and signed, as the statute requires. So, where a party to whom a receiver's certificate of indebtedness is issued indorses the same to another, his parol promise to guarantee its payment is within the statute of frauds. *McCurdy v. Bowes*, 88 Ind. 583. However, an oral promise to indemnify another for becoming bail for a third, indicted for felony, is not within the statute of frauds, but is enforceable. *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162; *Keesling v. Frazier*, 119 Ind. 185, 21 N. E. 552. In *Pettit v. Braden*, 55 Ind. 201, it was held that an oral promise by a third person to a seller of goods, who has refused to deliver without security for the price, that, if he will make delivery, the promisor will see that he gets his pay, is within the statute of frauds and must be in writing, even though the delivery was made on the faith of the promise. A different view was adopted by the court in *Gibson County v. Cincinnati Steam Heating Co.*, 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502. There the owner of property undertook to pay for work and materials to be subse-

quently done and furnished by a sub-contractor in order to secure the completion of a building where the principal contractor had failed to carry on the work. The court held the promise to be an original one and not within the statute of frauds.

With this mass of conflicting authority to review, the court in *Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233, upon which the court in the principal case relies, said "The general rule is that the new promise must put an end to the original debt, and extinguish it, or otherwise the new promise will be regarded as collateral, and within the statute." The rule that there must be an extinguishment of the original debt does not apply where the primary purpose is to secure benefit to the promisor, in consideration of which the promisor undertakes to pay the debt of another. *Small v. Schaefer*, 24 Md. 143; *Weisel v. Spence*, 59 Wis. 301, 18 N. W. 165; *Sext v. Geise*, 80 Ga. 698, 6 S. E. 174; *Craft v. Kendrick*, 39 Fla. 90, 21 So. 803; *Hall v. Alford*, 105 Ky. 664, 49 S. W. 444, 20 Ky. Law Rep. 1482; *Pool v. Sanford*, 52 Tex. 621; *Yeoman v. Mueller*, 33 Mo. App. 343; *Clifford v. Luhring*, 69 Ill. 401; *Schultz v. Cohen*, 13 Misc. 638, 34 N. Y. Supp. 927, 69 N. Y. St. Rep. 151; *Pizzi v. Nardello*, 209 Pa. 1, 57 Atl. 1100; *Roy v. Flin*, 10 Ariz. 80; *McLaughlin v. Austin*, 104 Mich. 489, 62 N. W. 719; *Fitzgerald v. Morrissey*, 14 Neb. 198, 15 N. W. 233; *McKeenan v. Thissel*, 33 Me. 368; *Prout v. Webb*, 87 Ala. 593, 6 So. 190; *Wickham v. Hyde Park Building and Loan Ass'n*, 80 Ill. App. 523; *Berg v. Spitz*, 87 App. Div. 602, 84 N. Y. Supp. 532. In some jurisdictions, however, interest alone, or a desire to obtain a benefit to himself, is not sufficient to sustain a promise to answer for the debt, default, or miscarriage of another, but there must be an entire novation, a substitution of the promisor in the place and stead of the original debtor, and his release. Several cases in Massachusetts, Vermont, and Virginia have followed the doctrine that a release of the original debtor is necessary before the promise can be outside the statute. *Griffin v. Cunningham*, 183 Mass. 505, 67 N. E. 660; *Miles v. Driscoll*, 201 Mass. 318, 87 N. E. 579; *Engleby v. Harvey*, 93 Va. 440, 25 S. E. 225; *Newell v. Ingraham*, 15 Vt. 422; *Anderson v. Davis*, 9 Vt. 136, 31 Am. Dec. 612; *Sinclair v. Richardson*, 12 Vt. 33; and *Garfield v. Rutland Ins. Co.*, 69 Vt. 549, 38 Atl. 235.

If it can be said in the principal case that the primary purpose of the promisor was to gain some advantage to himself, and not to aid the debtor, and if the principal case and *Lowe v. Turpie*, *supra*, are to be the law in Indiana, it seems that Indiana has adopted the minority rule with regard to verbal contracts of guaranty, and a rule which will tend to extend, rather than diminish, the application of this section of the statute of frauds.

O. M. B.